BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, N.W.
WASHINGTON, D. C. 20001-8002

DATE ISSUED: October 31, 1996

CASE NO: 94-INA-511

In the Matter of:

MEADOWBROOK COUNTRY CLUB,
Employer

On Behalf of

MANDY CAROL NALL,
Alien.

Appearance: Donald Ross Paterson, Esquire, Tyler, TX
for the Employer and the Alien

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Mandy Carol Nall ("Alien") filed by Employer Meadowbrook Country Club ("Employer") pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor, Dallas, Texas, denied the application and the Employer requested review pursuant to 20 C.F.R. § 656.26.

Under Section 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the

wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On August 25, 1992, as amended, the Employer filed an application for labor certification to enable the Alien, an English national, to fill the position of Associate Tennis Pro at a salary of $10.11 per hour. (AF 50). The job duties were:

> Supervise and give lessons to members on technique of tennis, administer and organize tournaments and leagues, enforce club rules, coach and develop high level junior players and adult traveling teams, be able to direct junior players on high level tennis strategy, teach psychology of the sport, motivate and prepare players for college level tennis. Advise on proper selection of equipment, restring rackets, advise on court maintenance, and officiate tournaments.

(AF 50). The educational requirement was 4 years of college, with a Bachelor's degree in Psychology or Sports Psychology; the experience required was 3 months in the related occupation of Tennis Instructor. Special requirements were listed as:

> Applicant must be an ACAA Div I or Div II level college player. Travel within state of Texas to area and state tournament as coach for junior player teams.

(AF 50). Part B of the application indicated that the Alien had a BA in Psychology and had slightly over three months of experience as a tennis instructor. (AF 60-62). A statement from the Employer dated August 14, 1992 indicated that they had no success in locating qualified U.S. applicants and summarily stated that any special requirements arose out of business necessity. (AF 75-76).

On February 11, 1994, the CO issued a Notice of Findings in which she concluded that the application was violative of 20 C.F.R. § 656.21(b)(2) because the Employer has failed to provide sufficient documentary evidence establishing that the job opportunity was being described without unduly restrictive job requirements. The

Employer was advised to provide documentation establishing business necessity for (1) the educational requirement of a BS or BA degree in Psychology or Sports Psychology, as opposed to some other discipline such as Liberal Arts or Physical Education and (2) the special requirement that the applicant be an ACAA Division I or Division II level college player, as opposed to Division III. Alternatively, the Employer was advised to delete the requirements and agree to readvertise. (AF 19-21).

The Employer submitted rebuttal consisting of a letter dated March 2, 1994 from Karen Crumpton, "Court # 1 Tennis/Director" for the Employer, indicating that the mission of her tennis program was "to provide [her] players with a complete tennis experience offering physical, technical, strategical, and mental training" and "to produce state ranked and collegiate scholarship players." Concerning the special requirement, she stated that Division III players are nonscholarship and the division includes players of a lower standard who could not provide her players with the insight to a higher level of play in the way that a Division I or II player could. With respect to the degree requirement, she stated that at the higher level of playing the mental side becomes the main factor between winning and losing, and "it is imperative that [she] hire a candidate with a degree in sports psychology or psychology" in keeping with her mission statement. (AF 16-17).

On March 28, 1994, the CO issued an amended Notice of Findings stating that the rebuttal did not explain how the requirements constitute business necessity, as required by 20 C.F.R. § 656.21(b)(2), because the Employer had failed to show that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner. (AF 12-14).

In response to the second Notice of Findings, counsel for the Employer argued that the rebuttal previously submitted was sufficient. (AF 9-10).

By a Final Determination dated May 26, 1994 (AF 6-8), the CO denied the application because the Employer did not meet the requirements of 20 C.F.R. Part 656 and the employment of aliens would have an adverse effect on wages and/or working conditions of U.S. workers similarly employed. Specifically, the CO found that the Employer had not established business necessity for the restrictive requirements in accordance with 20 C.F.R. § 656.21(b)(2). The CO also added:

> In our opinion, the employer has gone well beyond what would be required for the job as normally performed in the United States. In general, it is the business of a country club to provide a pleasant setting in which its members can partake of social, entertainment, and physical activities. The club succeeds by makings its offerings attractive to its members. However, an effort to promote excellence in sports activities, while admirable, exceeds the realm of business necessity for alien labor

certification purposes. Having been given the opportunity twice, the employer did not correct the deficiencies in its application on either occasion.

(AF 8.)

The Employer requested reconsideration and, in the alternative, review of that denial by letter of June 28, 1994. (AF 2-3). The request for reconsideration was denied by the CO and the file was sent to the Board of Alien Labor Certification Appeals. (AF 1).

The Employer's Statement of Position was filed on August 9, 1994.

DISCUSSION

In the instant case, the issue before us is whether there has been a showing of business necessity for (1) the educational requirement of a BS or BA degree in Psychology or Sports Psychology and (2) the special requirement that the applicant be an ACAA Div I or Div II level college player. For the reasons set forth below, we find that the Employer has failed to establish business necessity for the first requirement, although it has done so for the second one.

In order to establish business necessity under section 656.21(b)(2)(i), an employer must demonstrate that the job requirements (1) bear a reasonable relationship to the occupation in the context of the employer's business and (2) are essential to perform, in a reasonable manner, the job duties as described by the employer. ***In re Information Industries, Inc.***, 88-INA-82 (Feb. 8, 1989) (***en banc***).

The rebuttal submitted by the Employer adequately explains the necessity for requiring applicants to be Division I and II players, in view of the objective to train players at a higher level of play, which reasonably would require a higher level of player. The Employer has shown both that the requirement bears a reasonable relationship to the job and that it is essential to perform the job duties described. We find the unrefuted statement by the Employer's tennis director is adequate rebuttal with respect to this requirement. In addition, we agree with the Employer that the gratuitous language in the Final Determination as to what a country club's business objectives **should** be amounts to an impermissible challenge to the job itself.

Applying the same test, the Employer has failed to establish business necessity for the educational requirement of a degree in Psychology or Sports Psychology. In this regard, the unrefuted statements of the tennis director establish that high level tennis has a "mental side," and that one of the job duties involves teaching the psychology of the sport, thereby arguably satisfying the first prong of the test. However, the Employer has failed to demonstrate how a degree in either Psychology or

Sports Psychology "is essential to perform, in a reasonable manner, the job duties as described by the employer." ***Information Industries, supra.*** In this regard, the Employer has failed to show how either type of college degree would specifically prepare an applicant to perform the job duties and has completely failed to explain why another type of degree, such as a degree in Physical Education, would not prepare the applicant as well or better to perform the stated objectives. We agree with the CO that this restrictive requirement appears tailored to the Alien's qualifications and that the Employer has failed to establish business necessity for it.

Because the Employer has failed to establish business necessity for one of the restrictive requirements, the application for labor certification must be denied.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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PAMELA LAKES WOOD
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case Name: Meadowbrook Country Club (Mandy Carol Nall, alien)

Case No. : 94-INA-511

Title : Decision and Order

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Vittone			
Huddleston			

Thank you,

Judge Wood

Date: